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JAMES R. BROWNING

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 580

FRANCIS H. SNYDER ET AL,
Appellants,

v.

TOWN OF NEWTOWN ET AL,
Appellees.

APPEAL FROM THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

MOTION TO DISMISS.

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MOTION TO DISMISS.

Appellees move, pursuant to Rule 16 (1), that the appeal from the final judgment of the Supreme Court of Errors of the State of Connecticut be dismissed for want of jurisdiction on the grounds (1) that the appeal does not present a substantial federal question, and (2) that the appeal does not present a justiciable case or controversy within the jurisdiction of the Court.

OPINION BELOW.

The opinion of the Supreme Court of Errors of Connecticut is reported at **147 Conn. 374, 161 A2d. 770** and is also found in Appendix A of the Jurisdictional Statement.

JURISDICTION.

The final judgment of the Supreme Court of Errors of Connecticut was filed on July 14, 1960. Notice of appeal was filed on September 12, 1960. The jurisdiction of this Court is sought to be invoked under **28 U.S.C. 1257 (2).**

Jurisdiction is challenged by this motion.

QUESTIONS PRESENTED.

The Legislature of the State of Connecticut, by Section 10-281 of the Connecticut General Statutes (Revision of 1958), allows a town, city or school district to provide, for its children attending private schools therein, not conducted for profit, any transportation services provided for its children attending public schools. The town, city or school district may provide such transportation services if, in a special election called for such purpose, the majority of the voters approve it. The voters of the Town of Newtown, acting under said legislation, approved such transportation services for children attending private schools. The appellants, who are taxpayers and residents of said Town, brought an action seeking to declare the legislation unconstitutional.

The questions presented are:

1.) Does the furnishing of such transportation to children attending a private parochial school by a municipality violate the First Amendment of the Federal Constitution as

made applicable by the Fourteenth Amendment?

2.) Does the classification between children attending non-profit private schools and those attending private schools conducted for profit deny to the latter the equal protection of the laws in violation of the Fourteenth Amendment of the Federal Constitution?

3.) In view of the decision in **Everson v. Board of Education,** 330 U.S. 1 (1947), does this case involve a substantial federal question?

4.) Do appellants have any standing to raise such questions in this Court?

STATEMENT OF THE CASE.

The first three paragraphs of the appellants' statement, as well as the first three paragraphs of the opinion of the Connecticut Supreme Court, Baldwin, C.J., accurately and completely state the factual background of this case.

The Connecticut Supreme Court, by a four to one majority, held the statute to be constitutional in all respects. One justice dissented, solely on the State constitutional question.

ARGUMENT.

I.

Appellants' Claim That Section 10-281 Of The Connecticut General Statutes, 1958 Revision, Violates The First Amendment Of The Federal Constitution, As Made Applicable By The Fourteenth Amendment, Does Not Present A Substantial Federal Question.

The precise question which the appellants seek to raise has already been considered and decided adversely to the appellants by this Court in **Everson v. Board of Education,** 330 U.S. 1 (1947).

At the outset appellants urge that the decision of this Court in the **Everson** case be reconsidered. Appellants indicate that the decision in **Everson** is an anomaly standing apart from the judicial implementation of the First and Fourteenth Amendments. Actually, the principles enunciated in this case are in harmony with, and constitute an appropriate implementation of, those basic principles enunciated in **Meyer v. Nebraska,** 262 U.S. 390; **Pierce v. Society of Sisters,** 268 U.S. 510; **Cochran v. Louisiana State Board of Education,** 281 U.S. 370; and **Prince v. Massachusetts,** 321 U.S. 158. Additionally, the decision of this Court in **Everson** was expressly confirmed in **McCollum v. Board of Education,** 333 U.S. 203, and its underlying principles were clearly articulated in **Zorach v. Clauson,** 343 U.S. 306.

Basic in this whole line of decisional law is the proposition that parents have the right to deter-

mine the agencies through which their children shall receive their education, and that the state may not take a hostile position—a position which would deprive the parents of the opportunity to fulfill their prior right to educate. So this Court stated in **Everson:**

> "That (First) Amendment requires the state to be a neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them." (p. 18)

The factual similarity between the **Everson** case and the one at bar is so direct that, for appellants' claim to be upheld, the court would have to reverse its decision in the **Everson** case. In both instances, the essential and salient fact is that public money is spent to transport children to parochial schools. This is exactly the issue decided in the **Everson** case.

Appellant seeks to distinguish the two cases on the ground that in **Everson,** the children rode on public buses and their parents were reimbursed for their fares, whereas here the children ride in regular school buses with all of the attendant safety precautions. It would appear that the difference in procedure has absolutely no bearing on the essential and central issue, **i.e.** whether or not the spending of public money for such transportation is in violation of the First Amendment.

If anything, we submit that the procedure in the instant case is even more desirable than the direct financial reimbursement involved in **Everson.** The

type of transportation involved here obviously has a direct effect "on the child's safety or expedition in transit." cf. **Everson v. Board of Education,** 330 U.S. at 20 (dissent, Mr. Justice Jackson).

> "The statute challenged in the case at bar . . . aids the parents in sending their children to a school of their choice, as is their right. It protects the children from the dangers of modern traffic and reduces the hazard of contracting illness in bad weather. It is consistent with the present-day policy of gathering children into modern schools for better educational opportunities. It primarily serves the public health, safety and welfare and fosters education. In the light of our history and policy, it cannot be said to compel support of any church."
>
> **Snyder v. Newtown,** 147 Conn. 374, 391.

Appellants further argue that a mixing or intermingling of school children is undesirable. They urge that they be completely segregated and cite the concurring opinion of Mr. Justice Frankfurter in **McCollum v. Board of Education,** 333 U.S. 203, 216. What they overlook, however, is the context of that opinion and the factual situation involved. In **McCollum,** the program of religious education was "patently woven into the working scheme of the school." Attendance checks at the religious classes, the conduct of such classes during school hours and on school property all presented "powerful elements of inherent pressure by the school system in the interest of religious sects."

In the case at bar, there are no such pressures, no such distinctions, no such influence under the direction of school authorities. Children of various races, colors and creeds board school buses in the morning in their own neighborhoods. We can assume they are friendly and are well aware that they all do not profess the same religion, have the same complexion or the same national backgrounds and customs. A few of the children alight at St. Rose's School, most go to the public school. Can this innocent mingling of our school-children realistically be said to promote "destructive religious strife"?

Arguments based on Canon Law are completely beside the point. Children may attend a parochial school because of the fulfillment of the parental duty to educate, because of the operation of the compulsory education law, because of Canon Law or because of a combination of these factors. The motives of the parents are irrelevant. The Legislature is interested in getting the children safely and expeditiously to approved schools so that the state may derive the benefit of an educated citizenry. Actually, to exclude the children because they attend parochial schools would violate the First Amendment. Mr. Justice Jackson in his concurring opinion in **McCollum** observed "If it could, in fairness, have been said that the expenditure was a measure for the protection of the safety, health or morals of youngsters, it would not merely have been constitutional to grant it; it would have been unconstitutional to refuse it to any child merely because he was a Catholic." **McCollum v. Board of Education,** 333 U.S. at 233. Similarly, the Su-

preme Court of the United States in **Everson** stated "On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." **Everson v. Board of Education, 330 U.S. at 16.**

But, this is the logical conclusion of Appellants' contention. They argue that the exercise of a guaranteed religious right should disqualify the child from riding on a public school bus. In the last analysis, the argument of appellants is based on a denial of religious liberty.

II.

The Appellants Lack Any Standing To Raise The Question Of A Violation Of The "Equal Protection" Clause Of The Fourteeenth Amendment.

In the case at bar, the appellants claim that the statute in question denies to the appellants the equal protection of the laws, "by specifying that transportation may be provided for children attending private schools which are not conducted for profit and denying such transportation for children to private schools conducted for profit."

The class, then, that is alleged to be discriminated against is those children (and perhaps their parents)

who attend schools in Newtown, which are conducted for profit. Nowhere in the appellants' complaint or in the stipulation of facts which constitute the record before this court can be found any allegation that either of the appellants are members of this class.

No one in the Town of Newtown has been discriminated against by this statute or by the local ordinance. Further, the appellants have not established, nor even attempted to claim, that they or their children are members of the class alleged to be denied equal protection of the laws.

In the absence of such a showing, the appellants cannot be heard to question the constitutionality of this legislation on these grounds. The rule is long and well established, being as basic as any of our principles of constitutional law.

> "It will be appropriate to consider the expulsion of students of private schools operated for profit when and if it is proved to have occurred, and is made the basis of a suit by one in a position to challenge it . . . "
>
> **Everson v. Board of Education,** 330 U.S., at 4. (footnote #2)

In this connection it should be noted that this issue was never considered or decided by the Connecticut Supreme Court because of the lack of standing of the appellants to make such a claim. Consequently, we have no way of determining what its decision would have been. In view of Section 1-3, Connecticut General Statutes, 1958 Rev., (dealing with the severability of invalid provisions of

legislative enactments) it could have either sustained the statute in its entirety, declared it invalid in its entirety, or excised the alleged discrimination as to private schools conducted for profit.

Therefore, we submit that the appellants have no right of appeal to this court under 28 U.S.C. 1257 (2) as to this question, or, if there be such a right, they have no standing to assert it.

III.

Appellants Lack Standing To Raise Any Question In This Court.

Appellants allege and it is agreed, that they are taxpayers in the Town of Newtown and that the program involves some additional cost to the Town. How much is involved cannot be ascertained, particularly since this action was instituted almost coincidently with the furnishing of such transportation, and also because the buses are in service and operating and are shared by all students.

It is not merely sufficient that the appellants show that they suffer in some indefinite way with the public generally but they must also demonstrate a direct, substantial injury to be complained of in this action, which must be a "good faith, pocketbook action." **Doremus v. Board of Education,** 342 U.S. 429. We submit that no such pecuniary loss is involved in this matter.

CONCLUSION.

Wherefore, the motion to dismiss the appeal should be granted.

Respectfully submitted,

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Attorneys for the Defendants-Appellees.